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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941

No. 794

FRED C. PERKINS, INDIVIDUALLY AND TRADING AS PERKINS BATTERY COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

CLAUDE T. RENO,
Attorney General of Pennsylvania,
DAVID R. PERRY,
Special Deputy Attorney General of Pennsylvania,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 794

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

vs.

FRED C. PERKINS, INDIVIDUALLY AND T/A PERKINS BATTERY CO.,
Appellant.

MAY TERM, 1941. No. 49.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

To the Honorable Harlan Fiske Stone, Chief Justice, and Associate Justices of the Supreme Court of the United States:

The Commonwealth of Pennsylvania, Appellee herein, by its Attorneys, Claude T. Reno, Attorney General, and David R. Perry, Special Deputy Attorney General, respectfully submit herewith their statement showing the Matters or

Grounds Making Against the Jurisdiction of the Supreme Court as asserted by appellant in that cause:

The present proceeding grows out of a suit in assumpsit filed by the Commonwealth of Pennsylvania, Appellee, against Fred C. Perkins, individually and trading as the Perkins Battery Co., Appellant, to collect from him contributions due and owing by him as an employer under and subject to the provisions of the Pennsylvania Unemployment Compensation Law, P. L. 1937, 2897, etc., 43 P. S. (Pocket Sup.) Sec. 751. The appellant denied liability on alleged grounds of unconstitutionality of the Pennsylvania Statute.

To sustain the jurisdiction of the Supreme Court of the United States in this cause the appellant alleges:

That Section 307 of the Unemployment Compensation Law of Pennsylvania is repugnant to the Constitution of the United States, in that:

1. It violates Section 8 of Article I of the Constitution of the United States, which prohibits states from burdening or interfering with interstate commerce.

2. It violates the Tenth Amendment to the Federal Constitution, in that it unlawfully usurps the power to regulate and burden interstate commerce which power is exclusively reserved to Congress.

A.

Appellant's first statement in support of the Honorable Court's jurisdiction is:

That Section 307 of the Unemployment Compensation Law of Pennsylvania is repugnant to the Constitution of the United States, in that:

> "It violates Section 8 of Article I which prohibits states from burdening or interfering with interstate commerce."

The Section of the Pennsylvania Law thus attacked, reads:

> "Section 307. Interstate Commerce.—No employer required by this act to pay contributions shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce, or that this act does not distinguish between employes engaged in interstate commerce and those engaged in intrastate commerce."

Even a most casual examination of the Pennsylvania Unemployment Compensation Law, makes self evident that the law,

1. in practical effect, makes no attempt to regulate interstate commerce; nor

2. does it impose a burden sufficient to impede the free flow of such commerce; nor

3. does it discriminate against such interstate commerce in favor of intrastate commerce; nor

4. does it conflict with any regulation made by Congress in the exercise of its supreme right.

Nothing in the record before your Honorable Court, other than appellant's *ipse dixit* assertion in his affidavit of defense, discloses that he is an employer engaged in interstate commerce or materially affected in relation thereto. Under such circumstances, so far as relates to appellant, any discussion of constitutionality under the "Interstate Commerce Clause" would of necessity be largely abstract and academic.

Mr. Justice Douglas in the recent case of *Nelson* v. *Sears Roebuck Co.*, 61 S. Ct. 586 (1941) said, at page 589,

> "Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determined whether a given tax prohibitively discriminates against interstate commerce." • • •

"A tax or other burden obviously does not discriminate against interstate commerce where 'equality is the theme'."

B.

Appellant's next statement in support of the Honorable Court's jurisdiction is:

That Section 307 of the Unemployment Compensation Law of Pennsylvania is repugnant to the Constitution of the United States, in that:

"It violates the Tenth Amendment to the Federal Constitution in that it unlawfully usurps the power to regulate and burden interstate commerce, which power is exclusively reserved to Congress."

The plain purpose of the Federal act was not to enact a Federal unemployment compensation law, but rather to encourage the passage of unemployment compensation laws by the several States. In this connection the Federal tax (Title IX) allows credits and offsets as specified in Section 902 of that act, based on contributions paid under State unemployment compensation laws duly approved by the Federal Social Security Act (26 U. S. C. A. 1600 &c). The Social Security Act, moreover, makes plain beyond peradventure that Congress was not (and did not intend) enacting a Federal unemployment compensation law applicable to interstate commerce employments. On the contrary, Congress expressly indicated its intent that State laws should cover employment and unemployment in such commerce by stating:

"No person required under a state law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce, or that the state law does not distinguish between employees engaged in interstate commerce and those engaged in intrastate commerce." (26 U. S. C. A. 1606 a)

By such an enactment, Congress itself most affirmatively announces and declares that it has not, nor does it intend to enter or cover this field. It relinquishes, as it were, exclusive jurisdiction therein to the Commonwealth of Pennsylvania and the Pennsylvania Unemployment Compensation Law. It follows, therefore, that no question of conflict could possibly arise as relates to the Pennsylvania Unemployment Compensation Law being a prohibited "regulation" of interstate commerce.

It is therefore submitted that Congress has in no sense entered, and that certainly it has not preempted, the field of unemployment compensation as applied to interstate commerce employments other than as to certain classes, i. e., railroads not herein involved.

C.

The general power of the States to enact unemployment compensation laws has already been determined by your Honorable Court in its decision in *Carmichael* v. *Southern Coal and Coke Company*, 57 Supreme Court, 868.

The constitutionality of the Federal Social Security Act was also upheld by your Honorable Court in *Steward Machine Company* v. *Davis*, 301 U. S. 548. The appellant makes mention of the fact that in argument of the latter case before your Honorable Court, the Solicitor General pointed out that a sustaining of the Federal Act was necessary because the States alone might not be able to protect themselves by an embargo or include within their own systems employers or employees engaged in interstate commerce. It is noteworthy, however, that in spite of the numerous constitutional questions raised before your Honorable Court on these two cases, your Honorable Court in its decisions thereon made no reference whatsoever to the validity or invalidity of either the Federal or State Acts, insofar as the interstate commerce question was concerned.

The right of the State to enact laws to protect the public health, the public morals, and the public safety, or to regulate in the interest of any of these objectives has never been deemed as violating the commerce laws of the Federal Constitution, where the States' enactment in their general and universal operations, only incidentally effect interstate commerce. State legislation is repugnant to the commerce laws only in those instances where it is shown that the challenged legislation imposes real obstacles and burdens upon interstate commerce through working a control or regulation over it.

MOTION TO DISMISS.

The Appellee moves the Court to dismiss the appeal filed herein on the ground that the question raised by the appeal is more fanciful than real and the case presents no substantial Federal question.

MOTION TO AFFIRM.

In the event that the aforesaid Motion to Dismiss is not granted, the Appellee moves the Court to affirm the decision of the Pennsylvania Supreme Court affirming judgment of lower court in sustaining Rule for Judgment for Want of a Sufficient Affidavit of Defense for the following reasons:

1. The questions raised by the appellant herein, involve no substantial federal question.

2. The questions raised by the appellant have, in substance, been determined by the Supreme Court of the United States, in its decision entered in *Carmichael* v. *Southern Coal and Coke Co.*, 57 S. Ct. 868; 301 U. S. 495.

3. The construction by the Supreme Court of Pennsylvania of the "Interstate Commerce Clause" upon which

the appeal is founded is in accord with the construction given by the Supreme Court in:

Carmichael v. *Southern Coal & Coke Co.*, 57 S. Ct. 868; 301 U. S. 495;
Steward Machine Co. v. *Davis*, 301 U. S. 548.

Respectfully submitted,

CLAUDE T. RENO,
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